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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing Programming	)	
Practices of Broadcast Television	)	
Networks and Affiliates	)	

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COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC No. 95-254 (released June 15, 1995) (*"NOPR"*). The *NOPR* proposes to revisit five rules governing the relationship between broadcast television networks and station affiliates. Specifically, the five rules the Commission reexamines are: (1) the right to reject rule, 47 CFR §73.658(e); (2) the time option rule, 47 CFR §73.658(d); (3) the exclusive affiliation rule, 47 CFR §73.658(a); (4) the dual network rule, 47 CFR §73.658(g); and (5) the territorial exclusivity rule, 47 CFR §73.658(b).

With its proposed reforms to these rules, the Commission seems willing to incur a significant cost to the public interest in exchange for illusory benefits. By allowing networks to tighten their grip over affiliates' programming decisions, these proposals would seriously undermine program diversity and would hinder licensees from fulfilling their mandate to serve their communities. The only benefits the Commission offers in exchange are vague, unquantified speculations that deregulation may prevent affiliates from free-riding on networks' promotional budgets and will preserve networks' profitability.

Such arguments forsake the goals that have been at the heart of the Commission's interpretation of the public interest for over six decades. The proposed changes - save one - would place the interests of wealthy networks ahead of the interests of the viewers. Goals of diversity and localism can only be met, however, if licensees have maximum programming discretion - they

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are the only entities required by the Communications Act to determine and to fulfill the needs of viewers and their communities. It is unrealistic to think that nationwide organizations can effectively do this or would; yet the Commission's proposed changes will leave the viewers in the networks' hands.

In any event, with this proceeding the Commission once again dangerously rushes to deregulate rules which preserve the delicate balance of power between networks and their affiliated stations. Instead, it should wait to gather and consider the effects of its last significant actions in this area, the repeals of the financial interest and syndication rules and the prime time access rule. *See Comments of Media Access Project*, MM Docket No. 95-40 (June 12, 1995), at 11 n. 6, 12 ("*MAP Affiliation Contracts Comments*"); *Comments of Media Access Project*, MM Docket No. 95-90 (August 28, 1995) at 2-3 ("*MAP Television Advertising Comments*").

In measuring this balance of power, the Commission must also be careful not to underestimate the formidable leverage networks have over their independently owned affiliates. *See MAP Affiliation Contracts Comments* at 9-11; *Reply Comments of Media Access Project*, MM Docket No. 95-40 (July 12, 1995), at 5-6; *MAP Television Advertising Comments* at 8-10.[1]

Finally, while MAP disagrees with the Commission's proposals to remove several rules examined in this proceeding, it does not oppose the Commission's proposed repeal of the dual

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[1]Although the Commission points to the "trend toward group ownership" of stations as possibly bolstering an affiliate's bargaining position, *NOPR* at ¶16, it exagerrates the effect this may have. First, in 1994 almost one-third of the stations (370 out of 1154) were owned by entities holding just one license. *Id.* Second, the Commission's statistic is overstated because it includes "group owners" that hold only two or three licenses and would not necessarily enjoy greater bargaining power. Third, this effect is purely speculative; the Commission presents no examples where networks actually have bargained with a group owner over multiple affiliation contracts at the same time.

network rule.[2] *See NOPR* at ¶¶38-43.

I. RIGHT TO REJECT RULE

The right to reject rule prohibits a broadcast station from entering into a contract with a network that forbids the station from either (1) rejecting network programming that the station "reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest," or (2) substituting a program that the station believes to be of greater local or national importance. 47 CFR §73.658(e).

The Commission proposes to retain the right to reject rule but to add the limitation that an affiliate station may not reject a network's programming "based solely on financial considerations." *NOPR* at ¶25. Although the Commission acknowledges that the rule implicates licensee control to program their stations in the public interest, it claims that it must balance this goal against preserving the health of the network/affiliate system. *NOPR* at ¶22. The only threat to the network/affiliate system it mentions, however, is the allegation that "rejection of the network's program causes the network to lose advertising revenues," which, in turn, "affect[s] the network's ability to fund popular new programming." *NOPR* at ¶23.

The Commission's mandate under the Communications Act includes promoting the public interest by ensuring licensee independence and discretion, not protecting network profit margins. This proposed limitation, however, will significantly curtail a licensee's editorial discretion. The right of broadcast licensees to decide what programming best suits their communities is unassail-

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[2]However, by allowing an entity to offer two network program services, the Commission should not allow it to avoid obligations placed on traditional networks. For example, a network should not be able to split into two network organizations to circumvent multiple ownership rules or other rules which are triggered by the number of weekly hours of network programming. In the former case, the Commission should look at the total number of stations the organization owns, and in the latter, it should look at the total weekly hours of programming offered by both services.

able. *See, e.g., Cosmopolitan Broadcasting*, 59 FCC 2d 558, 560-61, *recon. denied*, 61 FCC 2d 257 (1976), *remanded on other grounds sub nom. Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978); *Fairness Report*, 48 FCC 2d 1, 10 (1974); *En Banc Programming Statement*, 44 FCC 2303 (1960).[3]

Moreover, a station's decision to reject network programming for financial reasons is ultimately and inseperably linked with the public interest. It may, for example, result in added revenues for the station's news and public affairs programming.[4] Thus, not only is the proposed modification of the rule bad policy, it would be nearly unenforceable.[5]

It is almost comic for the Commission to suggest that the negligible decline in revenues due to affiliates' programming rejection will reduce the networks' creation of "innovative programming." *NOPR* at ¶ 22.[6] As Chairman Hundt recently said, "The broadcast TV networks have the wealth of Midas and the creativity of Michelangelo." Reed Hundt, *A Good Day For*

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[3]Moreover, this issue is closely tied to the Commission's decision on the network advertising representation rule, 47 CFR §73.658(i), in the pending Broadcast Television Advertising proceeding. *See Notice of Proposed Rulemaking*, Review of the Commission's Regulations Governing Broadcast Television Advertising, MM Docket No. 95-90 (released June 14, 1995). MAP has already proven that repeal of the representation rule will strike a blow to a licensee's capacity to make programming decisions. *MAP Television Advertising Comments* at 6; *MAP Television Advertising Reply Comments* at 4. Yet the Commission's proposal to limit the right to reject rule would pile yet another burden on licensee autonomy.

[4]This is the same argument the Commission makes to underscore the importance of protecting network revenues. *See NOPR* at ¶22. Yet it applies with even more force to local stations, who - unlike networks - are licensed and obligated to create programs serving their communities.

[5]Should the Commission decide to adopt this limitation, however, it should place the burden of proof on the network to show that the rejection was based solely on financial considerations. The alternative - requiring the affiliate to show a non-financial reason for rejection - would allow networks to file harassing complaints and would place an onerous burden on the stations. The practical impact of placing the burden on the affiliate would be a chilling effect on rejections - tantamount to repealing the rule altogether.

[6]Indeed, the Commission admits that the number of cases of affiliate rejection of network programming is small. *NOPR* at ¶22 n. 27. Therefore, the costs to network revenues are low. Yet the infrequency of actual instances of rejection does not make licensee programming discretion any less important to the public interest. Any curtailment of the right to reject programming for any reason affects all licensees.

Kids, Address Delivered Before the Center for Media Education (October 18, 1995) at 6.

Indeed, network revenues are higher than ever before - even without the Commission's suggested limitation on the right to reject rule. *See, e.g.*, Kevin Goldman, *Networks' Record Upfront Sales Could Prove to Be Mixed Blessing*, Wall Street Journal, August 17, 1995, at B12 (Upfront advertising committments for 1995-96 season totaled $5.77 billion for the four major networks, a 30% increase from previous year). Isolated incidents of rejection of programming will hardly make a dent in these revenues and programming budgets. As networks continue to merge, resulting in ever more concentration of resources and power, the Commission hardly need concern itself with protecting them. *See, e.g., Comments of Media Access Project*, Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-123, (March 7, 1995) at 5-6.[7]

II. TIME OPTION RULE

The time option rule prohibits stations from entering into contracts which permit a network to "option" certain hours of the station's broadcast day. 47 CFR §73.658(d). Under the rule, the network may or may not decide to program during those hours. *Id.*

The Commission proposes to repeal the time option rule so that stations would be allowed to option time to the networks, subject to a predefined notice period. *NOPR* at ¶32. It also asks whether it should distinguish between developing and established networks. *Id.*

The time option rule should be retained in its present form for the four major networks, but the Commission should carve out an exception for developing networks such as WB and UPN. This is because, as the Commission itself points out:

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[7]In any event, the ability to reject network programs for purely economic reasons is especially important for stations in smaller markets, which are likely to be less financially robust. At the very least, if the Commission does adopt this proposed limitation, it should consider applying it only to stations in the largest markets.

> A new network...may want to book a time slot with enough stations so that it can raise funding to develop a programming concept, but at the same time may want to retain the ability to opt out of those time slots if the program does not work out as expected.

NOPR at ¶30. Established networks have far less need for that kind of access.

Should the Commission repeal the time option rule, it should at the very least provide for a notice period. MAP agrees that some advance notice is necessary in fairness to affiliates' needs to obtain alternative programming if a network decides not to exercise its option. MAP defers to other interested parties to determine the appropriate length of time for this period.

III. EXCLUSIVE AFFILIATION RULE

The exclusive affiliation rule prohibits a station from having any agreement with a network in which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization (both national and regional). 47 CFR §73.658(a).

The Commission proposes to repeal the exclusive affiliation rule, "at least in large markets." *NOPR* at ¶37. Although it notes that the rule was originally adopted to help ensure that new networks had outlets for their programming, the Commission reasons that the increase in the number of television stations means that finding outlets is no longer a problem for new networks. *NOPR* at ¶¶33, 34. On the other hand, it fears that by using secondary affiliation, an emerging network could take unfair advantage of the "potential of increased audience visibility" of big network programming. *NOPR* at ¶¶35, 36.

MAP can see no reason to repeal the exclusive affiliation rule. It is an unobtrusive regulation, with few economic costs, that promotes the Commission's goals of competition and diversity. Significantly, repeal would be a direct assault on licensee autonomy. With exclusive affiliation, a network would be able to dictate its affiliate's schedule during non-network time by forbidding it from airing certain shows.

Furthermore, repeal of this rule would diminish licensee ability to carry programming which serves the public interest and would thereby reduce program diversity. For example, if an affiliate decides that it would serve community tastes and needs to carry programs from a regional sports, entertainment, or religious network, it would not be able to do so.

Finally, repeal would seriously undermine the Commission's competition goals in two ways. First, FCC rules ambiguously define exclusive affiliation agreements as applying to "programs of any other network organization." 47 CFR §73.658(a). It is unclear whether this would include programs ***syndicated by***, or whose syndication rights were ***owned by***, another network. If so, in a world without the Financial Interest and Syndication Rules, a network could prevent its affiliates from purchasing shows offered by any competing network interests.

Second, the rule has been essential for emerging networks to gain outlets for their programming which otherwise might not have been available. The growth in the number of broadcast stations does not change this, because the two new networks are still in need of outlets,[8] and because other entities may attempt to create still more networks. *See, e.g.*, Christopher Stern, *TCI, Diller make TV play*, Broadcasting and Cable, August 28, 1995, at 6 (With purchase of Silver King stations, Barry Diller expected to launch a seventh broadcast network).

IV. NETWORK TERRITORIAL EXCLUSIVITY RULE

The Commission asks several questions concerning the "Network Territrorial Exclusivity Rule." That rule provides, in relevant part, that the Commission will not license a broadcaster

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[8]For example, UPN currently has 79 primary affiliates. It has almost as many secondary affiliates, 66, which boost its audience reach to 90% of all U.S. television households. *See, Comments of Chris-Craft Industries*, MM Docket No. 95-90 (August 28, 1995) at 2-3. In comparison, ABC, NBC, CBS, and Fox have 226, 221, 218, and 201 affiliates respectively. ABC, NBC, and CBS reach 99% of television households, while Fox reaches 98%. *Id. See also* Steve Coe, *WB/UPN talk no action*, Broadcasting and Cable, September 25, 1995, at 32 (weak affiliate lineups a factor threatening UPN's and WB's profitability and survival).

which enters into a contract with a network that: (1) "prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station" ("first prong"), or (2) "which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization" ("second prong"). 47 CFR §73.658(b). The Commission has proposed repealing the first prong of the rule altogether, and retaining the second prong but modifying it to apply to a broader area than the station's community of license. *NOPR* at ¶50.

In its analysis of the first prong of the rule, the Commission asserts that its primary benefit, prevention of anticomptetitive behavior by broadcast stations, is negligible for two reasons. *NOPR* at ¶47. First, it notes that because a number of affiliation agreements provide for termination of an affiliate for preempting programming too frequently, there could not be a great number of instances where programming rejected by an affiliate is offered to another station in the same community.[9] *NOPR* at ¶48. Second, it observes that some affiliation agreements confer exclusivity as against satellite and other delivery mechanisms. *Id.*

But the Commission is wrong to focus on the number of occassions where the first prong would operate, since this limitation of licensee discretion would touch all stations in all markets. This rule helps maintain stations' ability to offer programming serving the interests of their community. When a show is dropped by an affiliate and picked up by another station in that community, each station is making a decision that it believes serves the viewers' tastes and needs.

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[9]It is ironic that the Commission would use such termination clauses as an argument to repeal this prong of the rule. In this and other related Notices its proposals to deregulate networks are premised on the relative lack of power networks have over affiliates. *See Notice of Proposed Rulemaking*, Filing of Network Affiliation Contracts, 10 FCC Rcd 5677 (1995); *Notice of Proposed Rulemaking*, Regulations Governing Broadcast Television Advertising, FCC No. 95-226 (released June 14, 1995). That affiliates submit to harsh penalty clauses like these is a clear sign that this premise is wrong: the networks still have an advantage in bargaining power.

In the absence of this prong of the rule, the latter station is prevented from carrying the show, and the public interest is disserved.

The first prong also helps prevent anticompetitive behavior. If it is repealed, the affiliate will have the power to constrain the editorial and business discretion of the station that wanted to broadcast the show. There is absolutely no valid, pro-competitive reason why the affiliate should dictate another station's programming decisions. As the Commission itself notes, deprivation of network programming "inhibit[s] comptetition and diversity." *NOPR* at ¶49.

For example, there are three possible instances where an affiliate might reject programming, and all three of them point to the need for the rule. The first is that the affiliate might reject a show because it has low ratings. But this case is trivial, since the affiliate would not care whether a rival station picks up an unpopular show.

Second, an affiliate might reject a show with higher ratings in order to carry other programs, perhaps material serving local and community needs. From an anticompetitive standpoint, the affiliate will care about a rival station broadcasting the rejected, high-rated show. But with territorial exclusivity, as noted above, the public interest would be harmed because a portion of viewers would be deprived of the opportunity to see the rejected show.

Third, an affiliate might reject a show because it disagrees with the editorial viewpoint embodied by the show. This affiliate could use territorial exclusivity to prevent the show from being aired anywhere in its community. In such a case, retaining the first prong of the rule helps this editorial viewpoint get expressed and ensures the free and open discourse of ideas.

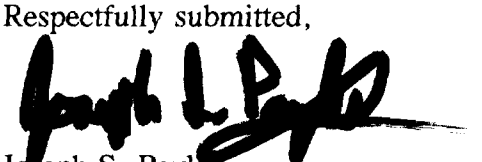
Additionally, the Commission claims that the first prong of the rule may be costly because it may discourage efficiency gains. *NOPR* at ¶47. "[O]ne could argue that giving one affiliate territorial exclusivity with respect to the network's programming...may encourage the affiliate to more vigorously promote the network's programming and provide more local services." *Id.*

To the extent it is possible to divine the logic of this argument, the Commission seems to say that giving territorial exclusivity to affiliates will encourage them to promote shows they have previously rejected. This bizarre assertion does not justify the clearly anticomptetive behavior that repeal of the first prong would permit. Once again, the hypothetical benefits of repeal do not outweigh the loss of important diversity and pro-competitive effects.

CONCLUSION

In their current form, the four rules discussed above help to preserve autonomous licensee programming and help to promote diversity and competition. The Commission's proposed modifications will not only fail to achieve any significant benefits, but they will also undermine these fundamentally important goals.

Respectfully submitted,



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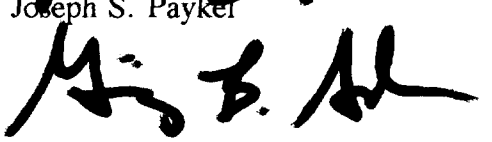

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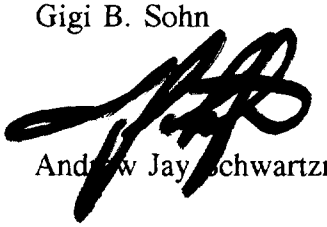

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October 27, 1995